

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-5212, 5213

MICROSOFT CORPORATION,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA and STATE OF NEW YORK, *et al.*,

Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**MICROSOFT CORPORATION’S OPPOSITION TO PLAINTIFFS’
MOTION FOR IMMEDIATE ISSUANCE OF THE MANDATE**

On June 28, 2001, the Court issued an Order on its own motion directing the Clerk to withhold issuance of the mandate until seven days after disposition of any timely-filed petition for rehearing. Under Rule 40(a)(1) of the Federal Rules of Appellate Procedure and Circuit Rule 35, appellant Microsoft Corporation (“Microsoft”) and plaintiffs each had 45 days in which to file a petition for rehearing. On July 13, 2001, plaintiffs filed the instant motion seeking immediate issuance of the mandate. In that motion, plaintiffs stated that they did not intend to file a petition for rehearing in this Court or to seek Supreme Court review at this stage of the proceedings.

On July 18, 2001, Microsoft filed a petition for rehearing. That petition requested the Court to reconsider its holding that Microsoft violated Section 2 by “commingling” software code specific to Web browsing with software code used for other purposes in certain files in Windows 98. Microsoft had informed the Department of Justice that it would be filing a petition for rehearing before plaintiffs filed their motion seeking immediate issuance of the mandate. On July 19, 2001, the Court issued an Order directing plaintiffs to respond to Microsoft’s petition for rehearing on or before August 3, 2001.

Microsoft’s petition for rehearing raises a substantial question and thus merits the attention of the Court. The mandate plainly should not issue while the Court is still considering Microsoft’s petition and plaintiffs’ response. *See* 20A JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 341.13 (3d ed. 2001).

Moreover, consistent with this Court’s June 28, 2001 Order and with standard practice under Rule 41(b) of the Federal Rules of Appellate Procedure and Circuit Rule 41(a)(1), issuance of the mandate should also be stayed for seven days following disposition of Microsoft’s petition for rehearing. *See* 16A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3987, at 740 (3d ed. 1999). Microsoft is currently considering whether to file a petition for a writ of certiorari in the Supreme Court. If Microsoft decides to seek Supreme Court review, it intends to file—within seven days of this Court’s disposition of Microsoft’s petition for rehearing—a motion to stay issuance of the mandate pending the filing of its petition for a writ of certiorari. Such a motion, if filed, would undertake to establish that there are substantial questions presented for Supreme Court review and that there is good cause for a stay. *See* FED. R. APP. P. 41(d)(2); D.C. CIR. R. 41(a)(2).

At this point, there is no basis to predetermine—as plaintiffs urge the Court to do in their motion—“that there is no reasonable likelihood that the Supreme Court would grant review.” *See Johnson v. Bechtel Assocs. Prof'l Corp.*, 801 F.2d 412, 415 (D.C. Cir 1986). Indeed, it was less than one year ago that the Department of Justice was vigorously urging the Supreme Court to accept a direct appeal in this case based on its “immense importance to our national economy.” U.S. Resp. to Jurisdictional Statement at 13. With the benefit of this Court’s narrowing and focusing of the issues, the Supreme Court may well undertake a review of one or more questions presented by the case now.

Accordingly, for the foregoing reasons, Microsoft requests that the Court deny plaintiffs’ motion for immediate issuance of the mandate.

Respectfully submitted,

William H. Neukom
Thomas W. Burt
David A. Heiner, Jr.
MICROSOFT CORPORATION
One Microsoft Way
Redmond, Washington 98052
(425) 936-8080

John L. Warden
Richard J. Urowsky
Steven L. Holley
Richard C. Pepperman, II
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
(212) 558-4000

*Counsel for Defendant-Appellant
Microsoft Corporation*

July 20, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2001, I caused two true and correct copies of the foregoing Microsoft Corporation's Opposition to Plaintiffs' Motion for Immediate Issuance of the Mandate to be served by hand upon:

Phillip R. Malone
Antitrust Division
U.S. Department of Justice
325 Seventh Street, N.W.
Suite 615
Washington, D.C. 20530
Tel: (415) 436-6675
Fax: (415) 436-6687
Counsel for Appellee United States

Catherine G. O'Sullivan
Chief, Appellate Section
U.S. Department of Justice
Antitrust Division
601 D Street, N.W.
Room 10536
Washington, D.C. 20530
Tel: (202) 305-7420
Fax: (202) 514-0536
Counsel for Appellee United States

Louis R. Cohen
C. Boyden Gray
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
Tel: (202) 663-6000
Fax: (202) 663-6363
Counsel for ACT and CompTIA

Paul T. Cappuccio
Randall J. Boe
Theodore W. Ullyot
America Online, Inc.
22000 AOL Way
Dulles, Virginia 20166
Tel: (703) 448-8700
Fax: (703) 265-1495
Counsel for AOL

Edward J. Black
Jason M. Mahler
Computer & Communications
Industry Association
666 Eleventh Street, N.W.
Washington, D.C. 20001
Tel: (202) 783-0070
Fax: (202) 783-0534
Counsel for CCIA

David R. Burton, Esq.
333 N. Fairfax Street
Suite 302
Alexandria, Virginia 22314-2632
Tel: (703) 548-5868
Fax: (703) 548-5869
Counsel for CMDC

Robert H. Bork
1150 17th Street, N.W.
Washington, D.C. 20036
Tel: (202) 862-5851
Fax: (202) 862-5899
Counsel for ProComp

Carl Lundgren
Valmarpro Antitrust
5035 South 25th Street
Arlington, Virginia 22206-1057
Tel: (703) 235-1910
Fax: (703) 235-5551

By facsimile and overnight courier upon:

Richard L. Schwartz
Deputy Chief, Antitrust Bureau
New York State Attorney General's Office
120 Broadway, Suite 2601
New York, New York 10271
Tel: (212) 416-8284
Fax: (212) 416-6015
Counsel for Appellee States

Christine Rosso
Chief, Antitrust Bureau
Illinois Attorney General's Office
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601
Tel: (312) 814-2503
Fax: (312) 814-2549
Counsel for Appellee States

Kevin J. O'Connor
Office of the Attorney General of
Wisconsin
P.O. Box 7857
123 West Washington Avenue
Madison, Wisconsin 53703-7957
Tel: (608) 266-1221
Fax: (608) 267-2223
Counsel for Appellee States

Lee A. Hollaar
School of Computing
University of Utah
3190 Merrill Engineering Building
50 South Central Campus Drive
Salt Lake City, Utah 84112-9205
Tel: (801) 581-3203
Fax: (801) 581-5843

Robert S. Getman
359 West 29th Street
Suite G
New York, New York 10001
Tel: (212) 594-6721
Fax: (212) 594-6732
Counsel for TAFOL

Donald M. Falk
Mayer, Brown & Platt
555 College Avenue
Palo Alto, California 94306
Tel: (650) 331-2030
Fax: (650) 331-2060
Counsel for SIIA

Bradley P. Smith